IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 794 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE D.P.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BHARATBHAI KACHARABHAI RATHOD

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 794 of 1996
MRS SHILPA J UNWALLA for Appellant No.
Mr S S Patel, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 21/06/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.P.BUCH)

The appellant abovenamed, an accused before the Sessions Court, Surat at Vyara in Sessions Case No.283 of 1995, has brought this appeal to this Court under Section 374 of the Code of Criminal Procedure, 1973, (for short, 'the Code') in order to challenge the judgment and conviction order dated 12.9.1996 convicting the present appellant for offence punishable under section 302 of IPC and sentencing him to suffer R.I. for life for the said offence.

2. The facts of the case of the prosecution in the aforesaid Sessions Case may be briefly stated as follows:

Deceased Daxaben was staying at village Karara, Taluka Palshana. Surat District with her son and daughter. Her husband, Amrutlal had died before few years. The present appellant has been staying in a house just opposite to the house of the deceased. It was alleged that the deceased had some illicit relation with one Balubhai of village Dabha. Same way, even the appellant had also some illicit relations with the deceased. Since the appellant came to know about the relationship between Balubhai and the deceased, the appellant felt annoyed and, therefore, on 13.9.1995 at about 7.30 a.m. the appellant went to the house of the deceased. There the convict took his objection to the relationship of the deceased with Balubhai and told the deceased that she should not have such relation with Balubhai. He also conveyed to the deceased that she should give him (the appellant) the key of the bicycle so that the appellant might go to Balu in order to kill him. The deceased did not part with the key of the bicycle and, therefore, the appellant got annoyed and angry at the deceased and dealt three blows on the head and face of the person of the deceased by means of axe. The deceased fell on the floor of the room with injuries on her head and face. Her daughter aged about 10 years went to call the informant Ukadbhai, brother of the deceased and told him that the appellant had dealt axe blows on the deceased. The informant went to the spot. Savitaben, sister of the deceased staying in the adjoining house had also rushed to the spot. The appellant was found with axe in his hand at that point of time. The deceased was shifted to the hospital where she was treated for some time but ultimately she succumbed to the injuries at about 11.30 a.m.

3. In the meantime, brother of the deceased went to the police station and filed his FIR before the said police station at about 11.30 a.m. conveying that the

appellant had dealt axe blows on the deceased and the deceased was seriously injured and was shifted to the hospital.

4. On receiving the FIR, the Police Investigating Officer started investigation in the case. In the meantime, since the deceased died, offence under section 302 of IPC was added against the appellant.

5. The Investigating Officer recorded statements of witnesses including statement of daughter Ramilaben, sister Savitaben, neighbour Laliben, another neighbour kamuben. The dead body of the deceased was referred to the Government hospital for post mortem. Inquest panchnama was drawn, panchnama of the scene of offence was also drawn. The appellant was arrested and axe found from him was seized by the Police Investigating Officer. Post mortem examination was carried out.
The appellant was arrested. The appellant had filed a non-cognizable complaint against Savitaben before the police station at about 19.30 hours on 13.9.1995. It was also registered by the concerned police station officer and the appellant was referred to the Medical Officer for examination and treatment.

6. The Medical Officer examined the appellant and treated him also. A certificate about injury on the person of the appellant was also issued by the Medical Officer. The Medical Officer also prepared post mortem note and it was forwarded to the Investigating Officer. On the conclusion of the investigation and after obtaining reports from the Forensic Science Laboratory, charge sheet was submitted before the concerned Court. Since the offence punishable under section 302 of IPC is exclusively triable by a Court of Sessions, the learned Judicial Magistrate First Class at Bardoli committed the case against the appellant to the Court of Sessions. There it was registered as Sessions Case No.283/95.

7. The learned Judge incharge of the case ascertained that copies of police investigation papers were supplied to the appellant. Charge at exh.4 was framed and explained to the appellant. On enquiry, the appellant pleaded not guilty to the said charge and claimed to be tried. The appellant also made it clear that he had made his arrangement for his defence by engaging private Advocate at his own costs.

8. Since the appellant not pleaded guilty to the said charge, the Court started recording of evidence of witnesses produced by the prosecution at the trial. The

prosecution has examined following witnesses:

PW 1 Dr.Gaurang Kirit Shah	Exh.7
PW 2 Ukadbhai Manibhai,informant and brother of the deceased.	Exh.11
PW 3 Ramilaben Amrutlal, daughter of decd. and eye witness	Exh.13
PW 4 Savitaben Mohanbhai, sister of decd.	Exh.14
PW 5 Laliben Manubhai, neighbour	Exh.15
PW 6 Kamuben Budhiyabhai, neighbour	Exh.16
PW 7 Dr.Chhaganbhai Karsanbhai-p.m.examination	Exh.17
PW 8 Pravinchandra Chunilal, Circle Inspector	Exh.20
PW 9 Pravinchandra Dalpatsingh, Panch	Exh.22
PW 10 Bhailabhai Karsanbhai, PSI and I.O.	Exh.30

The prosecution has also produced on record the following documents:

i. Certificate of injury of the deceased	Exh.8
ii. Death certificate of the deceased	Exh.9
iii. Blood Group examination of the deceased	Exh.10
iv. FIR	Exh.12
v. Post mortem examination Note	Exh.18
vi. Injury certificate of the appellant	Exh.19
vii. map of scene of offence	Exh.21
viii. Inquest post mortem	Exh.23
ix. Panchnama of scene of offence	Exh.24
x. Panchnama regarding seizure of clothes of the deceased	Exh.25
xi. Arrest panchnama of appellant	Exh.26
xii. FSL report	Exhs.27&28
xiii. Sketch showing house of deceased and the appellant	Exh.29
xiv. NC complaint of the appellant	Exh.31
xv. Report under section 157 of CR.P.C.	Exh.32
xvi. Police station diary	Exh.33
xvii. Police station diary about NC complaint of the appellant	Exh.34

9. On conclusion of the evidence as aforesaid, the trial court recorded further statement of the accused under section 313 of the Code. Then the circumstances appearing in evidence against the appellant were put to the notice of the appellant and he was given an opportunity to explain the said circumstances appearing in evidence against him. During the course of the said statement, the appellant had contended that he had not beaten anybody. That he was falsely involved and a false case was made out against him. Thereafter, the trial

court heard the arguments advanced by the learned Advocates for the parties and thereafter, it came to the decision that there was evidence of minor daughter Ramila who was a natural eye witness and her evidence was supported by evidence of other witnesses and other circumstances and, therefore, the trial court relied upon her evidence and found that the guilt against the appellant was proved beyond reasonable doubt. Therefore, the trial court convicted the appellant and after hearing him on the quantum of punishment, sentenced the appellant to suffer R.I. for life for offence punishable under section 302 of IPC.

10. Feeling aggrieved by the said judgment and conviction order of the trial court, the appellant has preferred this appeal before this court. It has been mainly contended here that the conviction recorded against the appellant is illegal. That the prosecution has come out with a false case that the appellant was the husband of the deceased. That the appellant had simply gone to the house of the deceased on hearing the shouts of the deceased with a view to save her life. That in fact he had not committed any offence and the evidence of minor daughter of the deceased is doubtful and at the instance of other members in the family, she had given false evidence and even she was tutored by the police in order to render false evidence against him. That therefore, if once evidence of minor daughter is ignored, then there is no other evidence on record and, therefore, the trial court was not justified in depending upon the evidence of minor child. That on the whole, the case against the appellant has not been proved beyond reasonable doubt and consequently, the conviction is not legal and valid. That therefore, the present appeal be allowed, that the judgment and conviction recorded by the trial court be set aside, the appellant may be acquitted of the offence under section 302 of the Code and he may be set at liberty forthwith.

11. On receiving the appeal, it was admitted and bail was refused. Therefore, the appellant is in custody. Ms. Shilpa Unwala, learned Advocate for the appellant and Mr S S Patel, learned APP have argued the appeal at a very great length. They took us through the evidence and the judgment of the trial court.

It is not much in dispute that as per the case of the prosecution, the deceased died in her house on account of the injuries sustained by her. The trial court has found that the deceased died a homicidal death. This fact is not seriously disputed by the learned

Advocate for the appellant during the course of her argument before this court. It seems that this point was not seriously disputed even before the trial court. Even otherwise, Ramila has positively deposed before the trial court that the deceased struck axe blows on the person of the deceased and she had sustained grievous hurts and within a span of four hours, she succumbed to the injuries in the hospital itself. This fact is supported by the evidence of Dr.Gaurang Kirit Shah Exh.7, who has also proved the injuries sustained by the deceased which include incised wounds on her person. Even the post mortem note Exh. 18 and the evidences of Dr. Kakadia at Exh.17 also go to show that the deceased had incised wounds on her person and there was fracture on bones and the deceased died on account of haemorhage and shock sustained by her on account of the aforesaid head injuries. Looking to the aforesaid evidence on record, it has to be accepted that the deceased died homicidal death. Then the next question would be as to whether it has been proved on record that the appellant had caused those injuries with intention to kill the deceased. The trial court has found that the appellant had caused the aforesaid injuries to the deceased with a view to commit her murder.

12. In order to prove the above event, the prosecution has examined Ramila Amrutlal at exh.13 as PW 3. She was the daughter of the deceased. she was studying in Standard 5th at the relevant point of time. She was aged 10 years at the time when she had given evidence before the trial court. It seems that before putting any question to this witness, the trial court had made an enquiry as to whether the witness was in a position to understand the sanctity of oath to be given to her. After satisfying herself with the said position oath was given and evidence of the said witness was recorded on oath.

13. It seems that this fact was not seriously disputed before the trial court. Even before this Court, this fact has not been disputed by the learned Advocate for the appellant. Ramila Exh.13 is a natural eye witness. She was admittedly staying with the deceased. Since she was the daughter of the deceased, it is natural that she would stay with the deceased. It is also a fact that her father Amrutlal had died about one year before the date of the incident and since then the deceased was staying in the said house with Ramila and her younger brother. The witness has deposed before the trial court that her mother, deceased, was hit by the appellant. she has also stated on oath before the trial court that since

her mother, deceased, did not part with the key of the bicycle, the appellant had beaten her mother by means of axe. She has positively deposed that she had seen the appellant beating the deceased by means of axe. She has further deposed that the deceased was hit on her head, forehead and cheek. That the injuries were bleeding and she went to call Savitaben, sister of her mother. That she had also gone to call informant Ukadbhai being the brother of her mother. She had further deposed that Savitaben and Ukadbhai both had arrived there. Other persons had also gathered at the house. She has further stated that even her younger brother was also present at the house at the time when the incident had taken place, and he had also witnessed the incident. She has further stated that her mother was shifted to hospital and there she died. She also stated that the police had recorded her statement also. Now it is required to be considered that admittedly this witness was aged about 10 years and she was the daughter of the deceased. It has been tried to argue before this court also that considering her age, it would not be proper to rely upon her evidence, if it is not supported by any other evidence on record.

14. It is required to be considered here that this Ramila was the daughter of the deceased. She was staying with the deceased in the same house. The incident took place at about 7.30 a.m. and according to her evidence in cross-examination, she used to go to the School at about 9 a.m. and even her brother also used to go to the School at the same time. This shows that at about 7.30 a.m. her presence in the house was quite natural and therefore, it cannot be said that the witness was not present at the house and was tendering a false evidence at the instance of someone else or at the instance of some relatives or even the police.

15. It has, then, been argued that in the cross-examination, she has given a different version. It seems that in cross-examination, she has stated that one Balu of village Dabha used to come to the residence. However, she has further added that she and her brother used to sleep at early hours at night and, therefore, she was not in a position to state at what time Balu used to come at night hours.

16. With respect to the incident, the witness was cross-examined at length. There, she has stated that at the time when the incident took place, she and her brother were sleeping and that when she woke up, she saw that her mother, deceased, was lying with injuries. She was bleeding. She has denied that the appellant had not

beaten the deceased and false case is made out. She has also denied that her mother was hit by Balu. She has reiterated that the appellant had dealt blows on the head of the deceased. She has further denied that the appellant had come to the rescue of the deceased and thereafter, he has been falsely involved. she has again denied that the mother was not hit by the appellant. A suggestion was put to her that she was tutored as to how the evidence was required to be given by her. There she denied the said suggestion. It was also put to her that the police had tutored as to how the evidence was required to be given. This suggestion was also denied by her.

17. Looking to the nature of the cross-examination and the manner in which the witness has responded to the cross-examination, it is quite clear that her evidence was not shaken to any extent during the course of the lengthy cross-examination. An attempt was made to argue that the witness was asleep and when she woke, she found the deceased lying on the floor and her injuries were bleeding and, therefore, she could not see the incident and did not see the appellant causing injuries to her mother.

18. It is required to be considered that during the examination-in-chief, she has positively deposed that the appellant had caused injuries to the deceased by means of axe on her head, forehead, cheek and the injuries were bleeding. She has also deposed that she had gone to call her maternal uncle Ukadbhai.

If we consider the evidence of Ukadbhai, PW 2, Exh.11, this witness has positively deposed before the trial court that at or about 7.30 a.m. on the date of the incident, Ramila had gone to him and had told him that the appellant had dealt axe blow on her mother. This shows that Ramila was in a position to convey this fact to Ukadbhai at exh.11, the informant. If she had not seen the appellant causing the said injury to the deceased, then she would not have been in a position to convey the said fact to her maternal uncle but the fact that she had conveyed the fact to her maternal uncle, gave the name of the appellant as assailant and also told about the weapon used in committing the crime which clearly shows that the evidence of Ramila is quite natural and she had actually seen the appellant hitting the deceased by means of axe.

19. It is also required to be considered that the evidence of Ramila with regard to the parts of the body

receiving injuries has been supported by evidence of PW 2 as well as by evidence of Medical Officer who has clearly deposed that the deceased had injuries on her head, forehead and cheek. It is also required to be considered that the evidence of Ukadbhai, Exh.11 as stated hereinabove is supported by FIR Ex.12 lodged by him. The incident took place at about 7.30 p.m. at village Karara in Palshana Taluka, Surat District. FIR was registered at 11.30 a.m. at Palshana police station. This shows that within a span of four hours, FIR has been registered. In the FIR, it has been clearly mentioned that the incident was conveyed by Ramila to the informant and the said information contained that the mother of the witness, deceased, was hit by the appellant by means of axe on forehead, cheek, neck etc. This shows that even the FIR supports the case of Ramila as well as of the informant with respect to the person who had caused the injury, information with respect to the weapon used and the parts of the body of the deceased which received injuries at the hands of the appellant. So on material particulars, the evidence of Ramila is supported by the evidence of Ukadbhai at Exh. 11 and Exh.12.

20. When the FIR has been registered without any loss of time and it does not show any contradictory fact, then in that event, it is clear that the evidence of Ramila has to be accepted on the ground that it is amply supported by evidence of Ukadbhai at Exhs.11 etc. Ukadbhai has been cross-examined.Nothing has been brought on record which would rescue the appellant. On the other hand, it is required to be considered that though the witness has clearly deposed that Ramilaben had come to home at 7-7.30 a.m. in the morning and had conveyed to him that the appellant had dealt axe blows on her mother and that on receiving the information he had gone to the house of the deceased, there was no cross-examination on the point of the information given to him by Ramila. Though the witness was cross-examined at length, no question was put to him challenging the evidence of this witness that the aforesaid information in details was conveyed to him by Ramila. This shows that what Ramila saw in her house was immediately conveyed to Ukadbhai and Ukadbhai had placed it on paper in his FIR Exh.12. This shows that there was no concoction for subsequent improvement in the actual fact which had taken place at the time when the incident took place.

21. Ukadbhai (Exh.11), in his FIR at Exh.12 had stated that Amrutlal was the husband of Daxaben and he died about three years before the date of FIR. It was also conveyed in the FIR that after the death of

Amrutlal, the deceased was staying with the appellant. However, this fact has not been stated on oath by Ukadbhai during the course of his evidence at Exh.11. Therefore, in absence of substantive evidence on this aspect, this court may not take it into account as the statement of fact made in the FIR may not be treated to be substantive evidence. However, the fact that the entire episode was conveyed by witness Ramila was amply proved by the evidence of Ukadbhai and as said above, there is no serious challenge on the said aspect during the course of the lengthy cross-examination of this witness and, therefore, it is not possible to accept the suggestion of Ms. Unwala that the evidence of this witness should not be accepted by this Court.

22. On the one hand, the witness has no grudge against the appellant and though an attempt was made to argue that the deceased was hit by Balu and the appellant had gone to rescue her, then also Ukadbhai Exh.11 had no reason to save Balu and falsely involve the present appellant. Same way, if Ramila had seen Balu causing injuries to the deceased, then she had no reason to save Balu and falsely involve the present appellant.

23. Again Ramila was the daughter of the deceased and was staying with the deceased. If she had seen the appellant causing severe injuries to the deceased in her house itself, then she would not, in the ordinary course of nature, allow such person to go away and would involve the appellant falsely in a serious crime of murder of mother punishable with imprisonment for life or death.

24. Savitaben PW 4 Exh.14 was the sister of the deceased. She has clearly deposed that at about 7.30 a.m. on the date of incident, Ramila had gone to her place and told that the appellant had inflicted axe blow on the deceased. Therefore, she rushed to the house of the deceased. She has, further deposed before the trial court that the appellant was standing by the side of the deceased with axe in his hand. She has further stated that she had taken away the axe from him and he was made to sit outside the house. She has further stated that the injuries of the deceased were bleeding.

25. This witness, sister of the deceased has also been cross-examined at length by the learned advocate for the appellant. There she has admitted that Balu used to come to the house of the appellant very often and that Balu belonged to village Dabha and she had illicit relationship with the deceased. She has, however, denied that the appellant had gone to the house of the deceased

on hearing shouts of the deceased. she has also denied that the appellant had gone there to the rescue of the deceased. She has also denied that Balu had caused injuries to the deceased and, therefore, the appellant had gone to the rescue of the deceased. She also denied that with a view to save Balu, falsely, name of the appellant was introduced in the case.

26. Again it has to be considered that this witness has positively deposed before the trial court that Ramila, daughter of the deceased, had gone to her and told her that her mother was killed by the appellant by means of axe. This shows that Ramila had conveyed this fact to this witness also. Savitaben was the sister of the deceased and, therefore, it was quite natural that Ramila would convey the said incident to her. Moreover, she was also a next door neighbour of the deceased and therefore also Ramila had every reason to convey the incident to her. It was, therefore, natural on the part of Ramila to convey the incident to the informant and Savitaben, PW 4.

27. Savitaben has clearly deposed that the aforesaid incident was conveyed to her by Ramila. But there is no challenge to this witness in the evidence given by her. Even during the cross-examination, no question as suggested that Ramila had not given the aforesaid incident to her. falsely concocted.

This shows, from the aforesaid evidence of Ramila, that she had gone to Savitaben and Ukadbhai and informed them about the incident and she has been amply supported the evidence of Ukadbhai and Savitaben. Moreover, there was no cross-examination in this aspect of the case. Therefore, the evidence of this brother and sister lends ample corroboration to the oral evidence of Ramila.

28. Laliben PW 5 Exh.15 is a neighbour of the deceased. Her house is situated just opposite the house of the appellant. She has clearly deposed that she was at her house at 7.30 a.m. on the date of the incident. Daughter of the deceased shouted that her mother was being beaten and she went to the house of the deceased. At that time, sister of the deceased (Savitaben) had dragged the appellant out of the house. That she saw the deceased lying on the floor with bleeding injuries. Evidence of this witness clearly establishes presence of the appellant at the time when the incident took place. It further proves that Savitaben dragged the appellant out of the said house. Savitaben has also deposed that

she had pulled the appellant out of the house of the deceased and, therefore, evidence of this witness clearly supports the evidence of Ramila. In this aspect of the case, if the appellant was not at all involved in the incident, Savitaben had no reason to drive him out of the house.

29. Attempt was made to cross-examine the witness on the fact as to whether the deceased was staying with the appellant. It has come on records that the appellant was staying with the deceased. This further shows that the appellant had that much of relationship with the deceased at the time when the incident took place. This witness has also admitted that Balu of village Dabha used to come to the deceased and he had illicit relationship with her. Any way, Laliben is an independent witness. She had no grudge against the appellant. Her house is situated just opposite to the house of the deceased. She had gone to the house of the deceased on hearing shouts of the daughter of the deceased. She has proved presence of the appellant in the house at the relevant point of time.

30. PW 6, Kamuben Exh.16 is another such witness, who has deposed before the trial court that on hearing the shouts, she went out of her residence and found that the appellant was sitting on the ota with axe in his hand. She has also deposed that the deceased was lying on the floor with injuries which were bleeding. This witness was also cross-examined on behalf of the appellant and there she admits that the deceased had illicit relationship with Balu of village Dabha. A suggestion was put to her that Balu had dealt blows on the deceased and the appellant had gone to rescue the deceased. The witness has denied the said suggestion put to the witness during the course of cross-examination. Such suggestions may not be binding to the defence of the accused person. However, it shows that when the suggestion has been put and it has been denied, then it has to be accepted that the entire case of the prosecution that the deceased was beaten by Balu and the appellant had gone there merely to rescue, would stand falsified on account of the positive evidence on records.

31. If the appellant had really gone to the house of the deceased with a view to rescue her and if Balu had actually dealt blows on the person of the deceased, then at least this neutral witness had no reason to falsely implicate the appellant and to falsely save Balu. This witness has clearly deposed that it is not true that Balu had hit the deceased and the appellant had gone to the rescue of the deceased. She has also denied that the

name of the appellant was given by all of them collectively and falsely. She has denied that Balu had run away after causing injuries to the deceased. She has added that the deceased was hit by the appellant.

32. So the evidence of this witness amply supports he evidence of Laliben and other witnesses referred to hereinabove. Evidence of the aforesaid witnesses is further corroborated by the evidence of Dr.Chhaganbhai Karsanbhai, PW 7 at exh.17, who has clearly deposed that when he had carried out the post mortem examination of the deceased, it was noticed that the deceased had following injuries:

i. Incise wound 5" x 3" x 2" right forehead on the front part
ii. Injury 3" x 2" x 3" on front part of left forehead resulting in fracture of bone
iii. Incise wound 5" x 3"' 2" on left jaw.

This witness has deposed that the injuries were ante-mortem and on carrying out internal examination, it was noticed that fracture was found in respect of bones of head, a portion below left eye and left jaw and a portion above the left eye. Medical Officer has further certified that the deceased died on account of shock due to excessive bleeding and haemorrhage on account of the aforesaid head injury. His evidence is supported by post mortem note Exh.18. The witness was also cross-examined at length on behalf of the appellant. However, during the said cross-examination, no fruitful material was derived by the learned advocate for the appellant. This shows that the evidence of post mortem note and oral recovery of testimony of the Medical Officer lend complete corroboration to the oral evidence of the aforesaid witnesses including Ramila, Ukadbhai, Savitaben, Kamuben and Laliben. It also shows that the evidence of those witnesses is natural and, therefore, it is reliable and dependable since it inspires confidence of the Court.

33. PW 8, Pravinchandra Chunilal, Exh.20 is Circle Inspector who had drawn the map in respect of the incident in question. The said map has been produced at exh.21. Another witness PW 9, Pravinchandra Dalpatsingh, Exh.22 is a panch witness in whose presence panchnama was drawn. However, inquest report Exh.23 was admitted in evidence with the consent of the appellant. Panchnama at Exh.25 was also admitted in evidence, on the admission of the appellant, panchnama relates to recovery of muddamal clothes of the deceased seized by I.O. This panchnama

shows that a pink colour petticoat and a nicker with green colour were seized and they were stained with blood. Panchnama Exh.26 also was admitted in evidence on the admission of the appellant. It relates to the arrest of the appellant. There it has been mentioned that the appellant was limping as he had injury on the left leg as witness Savitaben had dealt stick blow on the said leg. Then there is evidence of FSL report Exhs. 27 and 28 which have been admitted in evidence on the admission of the appellant. Exh.29 is a sketch showing the situation of the houses of the appellant, Savitaben and Laliben. Then there is evidence of PSI, Bhailabhai Karsanbhai Exh.30 who is the investigating officer who had undertaken the investigation and at the close of investigation, he had submitted charge sheet before the Magisterial court. The complaint is at Exh. 31 which is a non-cognizable complaint filed by the appellant at 19.30 hours on 13.9.1995 against Savitaben saying that he was beaten by Savitaben with a wooden stick on her leg and on the back of the head. It is admitted by him that he and the deceased had some love affair since last one year and therefore, he was staying with her in her house. That her husband died three years back. That the deceased also used to have illicit relation with Balu and, therefore, he was angry with the deceased. That on the date of the incident at about 7.30 a.m. he had gone to the house of the deceased and had enquired as to why she was having illicit relation with Balu. That she was also told that she should give key of the bicycle and that he wanted to go to Balu in order to kill him. That at that time, the deceased did not part with the key and, therefore, the appellant got angry and brought an axe from the wada and dealt blows on the head and face of the deceased. That in the meantime, Ramila, daughter of the deceased started shouting and called persons from the neighbourhood. That at that time, Savitaben, sister of the deceased and others had reached there. That Savitaben had dealt stick blows on left knee as well as on the backside of his head and therefore, he had filed the said complaint. That he wanted to go to hospital and accordingly the appellant was sent to the hospital and the doctor had examined him and issued certificate which has been referred to hereinabove.

34. Learned Advocate for the appellant has argued that the aforesaid N.C. complaint cannot be treated to be an evidence against the appellant and, therefore, the said evidence should be ignored by this court.

At this juncture, learned APP has relied upon a decision of this Court rendered in the case of Rabari

Khima Ganda v. State of Gujarat, reported in 1979 (1) GLR 847. The relevant portion is reproduced for ready reference hereunder:

> "The counter complaint by an accused person given voluntarily and not in the course of examination of the accused under section 161(1) of the Criminal Procedure if given with a view to action being taken on it by police, would amount to a first information report under section 154 of a different cognizable offence, notwithstanding the fact that investigation against the accused has already started on a complaint made by the other side. If, on the other hand, he is answer to questions put to him gives out his version containing a complaint against the other side, it would be a statement recorded under section 161 (1). In the former case the counter complaint would not amount to a statement "in the course of an investigation" because the accused has not been examined by the investigating officer under section 161 (1) while in the latter case it would be a statement made in the course of examination under section 161 (1), and as such one made in the course of an investigation."

35. On the strength of the aforesaid judgment, the learned APP has tried to argue that the statement of fact made in the N.C. complaint of the appellant is relevant for the purpose of proving the fact of involvement of the appellant. Learned Advocate for the appellant has also argued that the fact of this N.C. complaint was not placed to the notice of the appellant during the course of his further statement under section 313 of the Code and, therefore, the said statement of fact made in N.C. complaint by the appellant cannot be treated to be an admission of the appellant against his own interest. It is also her argument that it was a statement made by the appellant after the commencement of investigation and the appellant was shown as accused right from the FIR filed by Ukadbhai and, therefore, it being an admission of guilt of the appellant made in presence of the police, cannot be taken into consideration. Any way, looking to the over all evidence on record, it is not even necessary for this court to consider and examine the said aspect of the case and while dealing with the appeal, this Court positively ignores the N.C. complaint filed by the appellant after his arrest or at the time of his arrest.

36. It has then been contended that the so-called eye witness Ramila had given two different versions during

the course of her evidence. Her argument is that at the first instance, Ramila at exh.13 had deposed in her chief examination that she had seen the appellant dealing with axe on the head of the deceased and the deceased sustained injuries on the head, forehead and cheek. That on the other hand, during the cross examination, this witness has deposed that at the time when the incident took place, she was sleeping and when she was awake, she found her mother lying on the floor with bleeding injuries. This shows that the witness had not seen the incident and she had not seen the appellant beating the deceased. It has also been argued that what the witness had witnessed was that when she woke up, the deceased was lying on the floor with bleeding injuries.

37. It is required to be considered that the evidence of a witness is required to be read as a whole. It cannot be read in piecemeal. If the evidence in chief and cross-examination is read together, it is clear that the witness and her brother both were sleeping and at the time when she got up, she saw the appellant beating her mother by means of axe resulting in injuries on the head and forehead of the deceased. It is also required to be considered that she immediately went to Savitaben and Ukadbhai and both of them were conveyed that her mother was being beaten by the appellant. Therefore, the evidence of this witness is required to be read with the evidence of her maternal uncle and Savitaben who have supported her evidence saying that she had conveyed the aforesaid episode to them. Therefore, considering the evidence of two witnesses rendered in chief cross examination and cross examination it cannot be said that she did not see the incident as she was sleeping. Even otherwise, it is highly improbable that a girl of 10 years of age would continue to be at sleep even though her mother was hit by axe. This was not a solitary blow. The appellant had dealt three blows by means of axe and were inflicted and caused injuries and this fact has been supported by medical evidence. Once the blow was dealt on the head of the deceased by the appellant, it is to be accepted that the deceased would have raised shouts. Even the witness also raised shouts. In view of the above position, it would be difficult to accept that the witness was sleeping and she denied that she was fast asleep till three blows were inflected by the appellant on the person of the deceased. It is also required to be considered that time and again, she has positively deposed that her mother was hit by the appellant and not by Balu. If she had seen Balu hitting and beating her mother, then there was no reason for her to say something against the appellant and in favour of Balu.

38. It is, therefore, clear that though Ramila is a child witness, the trial court had found that her evidence is reliable. Even on a preliminary enquiry, the trial court had found that the witness understood the sanctity of oath. Her conduct at and after the incident, are found to be quite natural. Without losing any time, she approached the informant and Savitaben who are the nearest relatives. This shows that her conduct in approaching them was quite natural. This would further show her maturity also. In that view of the matter, looking to the nature of evidence given by her and considering that it has been amply supported by the evidence of other witness like Savitaben and Ukadbhai and when the said evidence is further supported by medical evidence and FIR of the informant, it is amply clear that the evidence of Ramila is found to be satisfactory, reliable, trustworthy and acceptable and it inspires confidence of this Court also and having regard to the evidence of Ramila in the background of the evidence of other witnesses like the informant, Savitaben, Laliben etc. there is no doubt to any extent and there is absolutely no reason for this Court to take a view different from the view taken by the trial court. This court is, therefore, of the view that the trial court was justified in relying upon the evidence of Ramila supported by other evidences- oral and documentary referred to hereinabove. Once the evidence of Ramila is found to be reliable and acceptable, then there is no alternative but to hold, on the strength of evidence that it has to be accepted that the prosecution has proved its case beyond reasonable doubt. It was the appellant and appellant alone who had caused the aforesaid injuries on the person of the deceased. Once it is found that the appellant was present and he had dealt axe blows on the deceased, it is clear that there is evidence on record that he had illicit relationship with the deceased. It has also come on record that Balu had also similar relationship with the deceased. It seems that the appellant did not like the deceased having similar relationship of Balu and, therefore, he insisted that the deceased should give up the relationship with Balu. It seems that the deceased was not agreeable and, therefore, the appellant got angry and ultimately caused the aforesaid injuries on the head of the deceased. So to some extent, there is positive evidence of the motive on the part of the appellant on the commission of the offence in question. Even if the motive part is not given much weight, then also, there is sufficient direct evidence connecting the appellant with the crime in question.

39. With respect to the actual offence committed by the appellant again, it is clear that the appellant had used deadly weapon like axe which was lying in the Wada. The weapon was not with him before the offence was committed. The appellant brought the axe from the Wada and dealt three blows on the vital part of the body of the deceased and injuries were fatal and the deceased died within four hours and looking to the medical evidence it is clear that the head injury was fatal which shows that they were sufficient in the ordinary course of nature to cause death. It is also required to be considered that the deceased was immediately shifted to hospital. There she was treated but ultimately she succumbed to injuries. Therefore, the nature of injuries sustained by the deceased shows that the appellant had intention to cause murder of the deceased, injuries which were inflicted were intended to be inflicted and the injuries intended to be inflicted were really inflicted by the appellant on the deceased. This shows the clear case of intention to cause murder of the deceased. Therefore, the trial court was justified in convicting the appellant for offence of causing intentional murder of the deceased. In other words, there is no scope for holding that the appellant had not committed the offence under section 302 of IPC but he had committed offence either under section 304 part I or under 304 part II of IPC. Any way, the trial court was perfectly justified in convicting the appellant for an offence punishable under section 302 of IPC. Once the said offence is proved beyond reasonable doubt, the trial court had no alternative but to sentence him to suffer R.I. for life. There was no option before the trial court or even before this Court there is no option but to confirm the said quantum of punishment.

40. In above view of the matter, this Court finds there is no merit in the appeal of the appellant and, therefore, it deserves to be dismissed.

For the foregoing reasons, this appeal is ordered to be dismissed. The judgment and conviction order passed by the trial court are confirmed. The trial court shall naturally dispose of the muddamal articles in accordance with the order of the trial court.

[J M Panchal, J.]

[D P Buch, J.]

msp